Supreme Court, U.S.
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No. 02-891

In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under the "anti-cutback" rule contained in section 204(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(g)(1), "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," unless that amendment is authorized under two sections of ERISA not relevant here. ERISA section 204(g)(2)(A), added by the Retirement Equity Act of 1984, clarifies that "[f]or purposes of" this anti-cutback rule, "a plan amendment which has the effect of * * * eliminating or reducing an early retirement benefit or a retirement-type subsidy * * * with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits," and thus is also prohibited.

The question presented is whether, when an ERISA pension plan is amended to expand the categories of "disqualifying" post-retirement employment that "suspend" early retirement benefits under the plan, it violates ERISA's anti-cutback rule to apply that amendment to plan participants who had already retired, were already receiving benefits, and were already working in forms of post-retirement employment that were non-disqualifying under the prior version of the plan but were disqualifying under the amendment.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The anti-cutback rule of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, section 204(g),[1] prevents a pension fund from promulgating an amendment that "has the effect of * * * eliminating or reducing an early retirement benefit," if that benefit is "attributable to service before the amendment." In this litigation, the Seventh Circuit held that an amendment that changed the conditions under which a pension fund can "suspend" already-accrued benefits violates this anti-cutback rule.

The Seventh Circuit's decision is entirely faithful to the statute's language, and is plainly correct. Although – as petitioner stresses at length – it is true that in *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), the Fifth Circuit held that "suspending" pension benefits is not a form of "reducing" or "eliminating" those benefits, and thus does not violate the anti-cutback rule, the *Spacek* decision is in considerable tension with earlier Fifth Circuit precedent and therefore may not be binding even in that Circuit. Petitioner's broad assertions about the importance of this litigation to pension fund administration likewise have no merit. Thus, there is no reason for this Court to grant review.

STATEMENT

1. ERISA "is a 'comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system.'" *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 122 S. Ct. 708, 712 (2002)

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[1] Following convention, throughout this brief we cite by ERISA section number rather than to ERISA's codification in the U.S. Code. The two sections that we mainly discuss – ERISA sections 203 and 204 – are codified at 29 U.S.C. §§ 1053, 1054.

(quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980))). It is a commonplace that ERISA does not require an employer to provide its employees with any specific benefits. See, *e.g.*, Pet. App. 5a-6a. ERISA does, however, extensively regulate benefits once those benefits *are* provided. Thus, "ERISA protects employee pensions and other benefits by providing insurance (for vested pension rights), specifying certain plan characteristics in detail (such as when and how pensions vest), and by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans." *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996) (citations omitted); see also Pet. App. 6a.

For example, among ERISA section 203's various requirements for retirement plans are limits on a pension fund's discretion in how it may condition the receipt of retirement benefits based on whether a participant has resumed employment after initially retiring (and beginning to collect retirement benefits). Where a participant is covered by and receiving benefits under an ERISA pension fund sponsored by a single employer, the plan may suspend retirement benefits only if the employee resumes working for the "employer who maintains the plan under which [the retirement] benefits were being paid" (ERISA § 203(a)(3)(B)(i)) – in other words, resumes working for the original employer – and only for the period during which the participant is so reemployed. *Ibid.* In the case of participants in a "multiemployer plan,"[2] retirement benefits may be suspended only if the participant resumes work in a job "in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced," and again only during the period in which the participant is engaged in this disqualifying employment. ERISA § 203(a)(3)(B)(ii).[3]

[2] ERISA section 3(37) defines a multiemployer plan as a plan "maintained pursuant to one or more collective bargaining agreements" between a union or unions and employers, "to which more than one employer is required to contribute." Multiemployer plans "are common in industries with many small companies, each too small to justify an individual plan. They are also found in industries where, because of seasonal or irregular employment and high labor mobility, few workers would qualify under an individual company's plan (if one were established)." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 62-63 (3d ed. 2000) (quoting EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d ed. 1987)).

2. As this Court has repeatedly explained, "when Congress enacted ERISA it 'wanted to ... make sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'" *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996) (quoting *Nachman*, 446 U.S. at 375). Thus, ERISA provides, for example, a host of funding and vesting rules to protect participants' promised benefits. See page 2, *supra*; Pet. App. 6a. But the most direct protection of workers' reasonable

[3] Although a plan is required to abide by section 203's suspension rules in the case of "normal" retirement benefits – that is, retirement benefits available to an employee who has reached the normal retirement age, either as defined in the plan or under ERISA's default "normal" retirement age of 65 (see ERISA § 3(24)) – these rules do not apply to "early" retirement benefits. Thus, the Department of Labor's regulations implementing section 203 specify that "[a] plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age * * * for any reemployment and without regard to the provisions of section 203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." 29 C.F.R. § 2530.203-3(a).

reliance interests is the "anti-cutback" rule contained in ERISA section 204(g).

As originally enacted, section 204(g) provided that, with narrow exceptions, "[t]he accrued benefit of a participant under a plan *may not be decreased by an amendment of the plan*." Pub. L. No. 93-406, Tit. I, § 204(g), 88 Stat. 858 (emphasis added).[4] Because of the way accrued benefits were defined under ERISA, this provision "did not prevent the reduction of a plan's alternative schedule of benefits for workers who retired early." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 164 (3d ed. 2000). Congress legislatively cured this omission in 1984, by amending ERISA section 204(g). The existing general rule was renumbered as section 204(g)(1), and a new subsection 204(g)(2) was added, which provided that:

> For purposes of paragraph (1), *a plan amendment which has the effect of* –
>
> (A) *eliminating or reducing an early retirement benefit* or a retirement-type subsidy (as defined in regulations)
>
> * * *
>
> with respect to benefits attributable to service before the amendment *shall be treated as reducing accrued benefits*. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Retirement Equity Act of 1984 ("REA") § 301(a)(2), Pub. L. No. 98-397, 98 Stat. 1451 (emphasis added).

3. The Central Laborers' Pension Fund ("the Fund") is a multiemployer pension fund whose participants are mainly construction workers in central Illinois. The Fund is a "qualified" pension plan governed by ERISA. Participants are entitled to a variety of retirement benefits under the Fund; in particular, the Fund offers a traditional retirement pension (available to participants aged 65 or older), as well as two distinct forms of early-retirement benefits. All three are "defined benefit" plans.[5]

Eligibility for the first of the two types of early-retirement benefits is tied to a combination of the participant's age and the time period during which he or she contributed to the Fund. For example, since October 1, 1993, a participant has been eligible to retire at age 53 if at that age he has earned five "pension credits" under the Plan (see Plan § 3.5(a)[6]), which are accrued based on the number of years

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[4] Reductions in benefits were allowed "with the consent of the Secretary of Labor, in the event of a substantial business hardship, (sec. 412(c)(8) of the [Internal Revenue] Code [and the parallel section 302 of ERISA]) or [under] the rules permitting a reduction of benefits in the case of certain multiemployer plans (sec. 4281 of ERISA)." S. REP. NO. 98-575, at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

[5] A "defined benefit" retirement plan "is one where the employee, upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999) (citation and internal quotation marks omitted). "[T]he employer typically bears the entire investment risk" in a defined benefit plan. *Ibid.* Defined benefit plans contrast with "defined contribution plans," which are "one[s] where employees and employers may contribute to the plan, and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Ibid.* (citation and internal quotation marks omitted).

[6] The Fund filed the "Restated Plan Rules and Regulations," as restated effective October 1, 1994 (herein referred to as the "Plan") – along with amendments thereto – in the district court as Appendix I to its February 7, 2000, Motion for Summary Judgment.

that the participant has worked for employers who participate in the Fund and the number of hours the participant worked for these employers in each of those years.[7]

The other form of early-retirement benefit, which the Fund calls a "Service-Only Pension," depends only on the number of years of "vesting service" or the number of "pension credits" that the participant has accrued. Participants may retire and receive their "service-only" pension once they have accumulated 30 "pension credits," regardless of their age at the time of retirement. The pension a participant receives each month under the "service-only" program is the same amount as he would receive each month under the normal retirement plan. See Pet. App. 4a. Thus, because statistically an early retiree is expected to receive his pension for a longer period than someone retiring at the "normal" age, the "service-only" pension is a "retirement-type subsidy" as that term is used in ERISA. See *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 525 (3d Cir. 2000).

4. Thomas E. Heinz and Richard J. Schmitt, Jr., are each participants in the Fund. Pet. App. 4a. As of 1996, each had accrued at least 30 "pension credits," and thus had met all of the conditions to retire and to receive his "service-only" pension. Both did so. *Ibid.* Under the terms of the Fund when Messrs. Heinz and Schmitt retired, the service-only pension was to be suspended if a participant worked in specified "disqualifying employment." Although working as a union

[7] The formula for determining the number of pension credits a participant obtains in any given year has changed over time, and the details are irrelevant. But as an example, a participant could receive up to 2 pension credits during 1995, depending on the number of creditable hours that he worked during that calendar year. Participants working more than 2000 creditable hours received 2.0 pension credits; those working between 1900 and 1999 creditable hours received 1.9 pension credits, and so on. See Plan § 4.1(a)(1).

or non-union construction worker was disqualifying under the plan as it then existed (see *ibid.*), it is uncontroverted that working as a *supervisor* in the construction industry was *not* "disqualifying employment." See Pet. 4; Pet. App. 5a. After retiring as construction workers, both respondents began working as supervisors in the construction industry, while – as the plan allowed – collecting their early-retirement pensions.

Two years after respondents retired, the Fund amended the terms of the plan to expand the definition of disqualifying employment for purposes of early-retirement benefits. Under this 1998 amendment, the Fund would suspend early retirement benefits for work "in any capacity in the construction industry (either as a union or non-union construction worker)." See Pet. App. 5a. Although this amendment focused on "construction worker[s]," the Fund interpreted the amendment to prohibit employment even in a supervisory capacity in the construction industry. The plan also construed the amendment to apply to participants who had already qualified for early-retirement benefits prior to the amendment. Because Messrs. Heinz and Schmitt continued to work as supervisors in the construction industry, the Fund suspended their early retirement pension benefits.

5. After exhausting intra-Fund avenues for review of the decision to suspend their benefits, Messrs. Heinz & Schmitt brought suit in the Central District of Illinois. They claimed that the retroactive application of the 1998 Amendment to suspend their benefits violated the plain terms of the anti-cutback rule in ERISA section 204(g), which precludes amendments that "ha[ve] the effect of eliminating or reducing an early retirement benefit." In the alternative, they argued that the Fund acted arbitrarily and capriciously in interpreting the 1998 amendment to render their employment disqualifying, because the amendment by its terms is limited to employment as a (union or non-union) "*construction*

worker," rather than as a *supervisor* in the construction industry.

6. On cross-motions for judgment on the pleadings, the district court ruled in the Fund's favor. See Pet. App. 33a-45a. The Seventh Circuit reversed. See Pet. App. 3a-31a. According to the court of appeals,

> plaintiffs' loss of the option of working as construction supervisors was a reduction of their early retirement benefits within the meaning of [section 204(g)(2)]. A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment.

Pet. App. 9a. The court rejected the Fund's attempt to distinguish between suspensions of benefits and other reductions. As the court explained,

> [a]lthough with a suspension the interruption in benefit payments is temporary, the retiree never recovers the payments lost during the employment period. The amendment thus "eliminates" monthly benefit payments for participants who take certain jobs after retirement and "reduces" the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues. Plaintiffs lost a valuable right they had earned before the amendment – the right to continue to work in the industry while receiving monthly benefit payments – and that loss was permanent.

Pet. App. 10a.

The court considered the Fifth Circuit's decision in *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), on which the district court had relied, but found it unconvincing. Pet. App. 11a-22a. In particular, the court disputed the notion that its decision would render the word "suspension" redundant elsewhere in ERISA (Pet. App. 12a-15a), explained that an offhand comment by Representative Clay in the final House debates over REA was ambiguous at best and in any event due little weight (Pet. App. 16a-17a), and found a Treasury Regulation relied on by *Spacek* to be irrelevant to the interpretation of the appropriate scope of the anti-cutback rule (Pet. App. 18a-20a). Having ruled for respondents on statutory grounds, the court did not reach respondents' alternative, arbitrary-and-capricious, argument. See Pet. App. 23a. Judge Cudahy dissented. See Pet. App. 24a-31a.

REASONS FOR DENYING THE PETITION

This litigation does not warrant the Court's review. Although petitioner stresses that the decision below conflicts with the Fifth Circuit's decision in *Spacek*, that is insufficient to justify certiorari. It is doubtful whether *Spacek* would in fact be binding even in the Fifth Circuit, and in any event only two courts of appeals have analyzed the question presented. Moreover, petitioner's attempt to portray this litigation as being of great importance to pension plans is completely overblown. Finally, the Seventh Circuit's decision is entirely consistent with both the language and the purpose of the anti-cutback rule, and is plainly correct.

I. THERE IS NO NEED FOR THIS COURT TO RESOLVE THE PURPORTED CIRCUIT SPLIT AT THIS TIME.

Petitioner stresses that ERISA should be interpreted consistently nationwide, and asserts that "the conflict between the Fifth and Seventh Circuits with regard to the anti-cutback rule will result in exactly the kind of balkanization of pension rules which ERISA was designed to prevent" (Pet. 7). However, there may very well not be a circuit split for this Court

to resolve. Although the *Spacek* court held that an amendment that led to the "suspension" of early retirement benefits was not barred by the anti-cutback rule (see 134 F.3d at 288-291), the court seems to have based that decision in some part on a fundamental misunderstanding of the status of early-retirement benefits under the anti-cutback rule. In the process, the court failed to follow earlier Fifth Circuit precedent on the status of early-retirement benefits. But in the Fifth Circuit, "[w]here two panel decisions conflict, *the prior decision constitutes the binding precedent*." *United States* v. *Texas Tech. Univ.*, 171 F.3d 279, 286 n.9 (5th Cir. 1999) (emphasis added); see also *Lucky-Goldstar, Int'l (America), Inc.* v. *Phibro Energy Int'l, Ltd.*, 958 F.2d 58, 60 (5th Cir. 1992) ("[u]nder the law of [the Fifth] circuit," where two panel decisions conflict "the earlier panel opinion controls") (citing *Alcorn Cty.* v. *U.S. Interstate Supplies*, 731 F.2d 1160, 1166 (5th Cir. 1984)). No petition for rehearing was filed in *Spacek*, and neither the Fifth Circuit itself nor any district court within the Fifth Circuit has relied on the relevant portion of that case. Thus, it is unclear whether *Spacek* in fact describes the law even in the Fifth Circuit.

As petitioners have repeatedly admitted[8] – and as the Seventh Circuit held in this case (Pet. App. 18a-19a) – early retirement benefits are treated as accrued benefits for purposes of section 204(g). In 1993, the Fifth Circuit also expressly held that early retirement benefits are "accrued benefits" under the anti-cutback rule. See *Harms* v. *Cavenham Forest Indus., Inc.*, 984 F.2d 686, 691-692 (5th Cir. 1993). Despite *Harms*, the *Spacek* court refused to acknowledge that early retirement benefits are accrued benefits for purposes of section 204(g). See 134 F.3d at 291 ("early retirement benefits * * * *may or may not be* fully accrued") (emphasis added). But if early-retirement benefits are treated as accrued benefits for purposes of the anti-cutback rule – as the *Harms* court held and as the Seventh Circuit held in this case – then suspending those benefits "reduces" the total amount of accrued benefits, and thus violates the anti-cutback rule. See Robert B. Lamb, *Early Retirement Benefits and the Arbitrary and Capricious Standard Under ERISA in* Spacek *v.* Maritime Ass'n, 32 CREIGHTON L. REV. 1721, 1748-1749 (1999) ("*Harms* would support Spacek's argument that [section 204(g)] shields him from subsequent amendments."); see also Pet. App. 18a-19a.

[8] See, *e.g.*, Seventh Circuit Brief and Argument of Defendant-Appellee Central Laborers' Pension Fund, at 8 (Nov. 30, 2000) ("The Fund, as it did before the District Court, agrees that early retirement benefits have accrued status."); Answer ¶ 16 ("admit[ting] the factual allegations of Paragraph 16 of Plaintiffs' Complaint," which alleged that "[t]he monthly retirement benefits received by Plaintiffs prior to the 1998 Amendment are accrued benefits").

Because it is the earlier case, future panels in the Fifth Circuit are obligated to follow *Harms* rather than *Spacek*. But since *Harms* suggests that *Spacek* was wrong as a matter of circuit precedent, the conflict petitioner identifies may not exist. Not even district courts in the Fifth Circuit are bound by *Spacek* to the extent *Spacek* conflicts with earlier circuit precedent. Given the serious possibility that future courts in the Fifth Circuit may not consider *Spacek* to be binding, this Court's attention to the supposed split of authority is not necessary. The question whether amendments that expand the scope of the suspension of early retirement benefits violate the anti-cutback rule can always be addressed in the future, after it becomes evident that the courts of appeals are in fact divided on the issue.

In any event, the case law petitioners cite to stress the need to prevent the "balkanization" of ERISA law – *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), and *Egelhoff* v. *Egelhoff*, 532 U.S. 141 (2001) – involves the disruption that might arise were *states* allowed to pass their own employee benefit laws that were inconsistent with ERISA.

As the Court explained in *Fort Halifax*, ERISA's preemption provision was designed to "'eliminat[e] the threat of conflicting and inconsistent *State and local regulation*.'" *Fort Halifax*, 482 U.S. at 9 (quoting 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent)) (emphasis added).

Unlike instances where states have passed laws addressing subjects governed by ERISA – where, unless the courts intervene, plans will be, and will *remain*, subject to inconsistent rules – the difference in interpretation of the anti-cutback rule between the Fifth and Seventh Circuits, even if it exists, is of much less moment. In particular, only two courts of appeals have analyzed the question presented here. Allowing other courts to consider the issue, in a variety of distinct factual situations, might lead the lower courts to resolve the purported circuit split. And if not, the additional attention of these courts to the question would assist this Court were it eventually to consider the issue. See ROBERT L. STERN *ET AL.*, SUPREME COURT PRACTICE 229-230 (8th ed. 2002). ERISA covers an immense variety of pension plans; this Court would be well advised to wait until lower courts have confronted the applicability of the anti-cutback rule to plan amendments that purport to "suspend" benefits in a wider variety of factual scenarios before addressing the issue.

Finally, Congress recently amended section 204(g) to authorize amendments that reduce benefits – but *only* if those amendments met specific conditions. In particular, Congress ordered the Secretary of the Treasury to issue regulations allowing plans to promulgate amendments that "reduce[] or eliminate[] benefits or subsidies which create significant burdens or complexities for the plan and plan participants, *unless such amendment adversely affects the rights of any participant in a more than de minimis manner*." Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 645(b)(2), 115 Stat. 125-126 (2001) (emphasis added). Neither the Fifth nor the Seventh Circuit has analyzed this amendment, and in particular the Fifth Circuit has not had the

opportunity to determine whether it undermines that court's previous interpretation of the anti-cutback rule. Granting certiorari before the Fifth Circuit has the opportunity to consider whether this statutory amendment alters its analysis would be premature.

II. PETITIONER VASTLY OVERSTATES THE IMPORTANCE OF THIS CASE TO PENSION PLANS.

Petitioner errs in portraying (at Pet. 8-11) this litigation as being one with far-reaching consequences to pension funds nationwide. Much of petitioner's argument for the importance of this case relies on hypothetical instances where "the financial integrity" of a plan might be at risk were a plan's administrators not able to amend the plan. See Pet. 8, 10. The problem with this argument is that there already exists a "substantial business hardship" exception to the anti-cutback rule, which authorizes pension funds – with the permission of the Secretary of Labor – to amend a plan to reduce accrued benefits to protect a fund's financial integrity. See ERISA § 302(c)(8).[9] This escape hatch exists specifically for those instances where a pension fund might not otherwise be able to fulfill its obligations. But except for such extreme instances, the very choice to create a defined-benefit plan rather than a defined-contribution plan entails the *conscious decision* that the plan (and the employers who fund it) may be subjected to additional financial burdens if some prediction – for example, expected rates of return of the fund's investments in the market or, as in this case, the number of employees who will choose to accept early retirement – turns out to be wrong. See *Hughes Aircraft*, 525 U.S. at 439. That

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[9] In this case petitioner did not seek to amend its plan under the "substantial business hardship" rules. See Pet. App. 7a.

such predictions at times turn out to be incorrect is a necessary fact of life, rather than a cause for concern.[10]

Petitioner also claims that the supposedly "irreconcilable rulings of *Spacek* and *Heinz*" will wreak havoc on the administration of large plans, with "[t]he administrator of such a fund fac[ing] the daunting task of properly applying" the rules of each of these cases. Pet. 9. According to petitioner, "litigation would seem to be inevitable regardless of how the administrator attempts to apply these conflicting decisions to [a nationwide] plan." *Ibid.* But there is nothing irreconcilable about administering a plan subject to both of these decisions; *Spacek* in no way *requires* a plan to "suspend" accrued benefits. Thus, those few pension funds that might be directly subjected to litigation in both the Fifth and Seventh Circuits should not rely on *Spacek* – assuming, as we discussed above (at page 10-11), that *Spacek* is even controlling in the Fifth Circuit. Although these plans might *prefer* petitioner's rule, it belies reason to imply that *not* promulgating an amendment that would be authorized under *Spacek* but not acceptable in the Seventh Circuit would somehow require inconsistent plan administration, or subject such a plan to litigation.

Finally, petitioner (at Pet. 10-11) seeks to portray this litigation as important by focusing on the Seventh Circuit's explanation that "an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit

[10] In any event, an amendment expanding limitations on post-retirement reemployment is unlikely to protect the financial well being of a pension plan, because under such an amendment participants are still entitled to retire and collect their pensions. Even under the amended version of the plan at issue in this litigation, Messrs. Heinz and Schmitt are entitled to receive their pensions – "jeopardiz[ing]" "the financial integrity" of the Fund (Pet. 8) – merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry.

just as surely as a decrease in the size of the monthly benefit payment." Pet. App. 9a. According to petitioner, "[t]he potential disparate interpretation of 'materiality' among circuits fundamentally threatens the integral uniformity of ERISA." Pet. 10-11. But the key word in that sentence is "*potential*." There are no disparate interpretations of what constitutes a "materially greater restriction" for this Court to review. Rather, petitioner has focused on a portion of the Seventh Circuit's *explanation* for why amendments that expand the criteria for suspending benefits violate the anti-cutback rule. Until and unless that explanation has itself been shown to cause any problem in the administration of ERISA, this Court should instead focus on what the Seventh Circuit in fact decided: amendments that expand when pension benefits may be "suspended" violate the anti-cutback rule. That decision is not the broad "'anti-amendment' rule" (Pet. 10) about which petitioner complains.[11]

III. THE DECISION BELOW IS PLAINLY CORRECT

Review in this case is also unnecessary because the Seventh Circuit's decision is based on the only plausibly defensible interpretation of the anti-cutback rule. If there were any doubt about the correctness of the decision below, a simple hypothetical should eliminate it entirely: Under petitioner's approach, a plan would be entitled to promulgate an amendment "suspending" *all* early retirement benefits for 18 months, *without violating the anti-cutback rule*. Nothing in

[11] The recent amendment to section 204(g) discussed above (at page 12, *supra*), also helps demonstrate that the Seventh Circuit's decision will not wreak havoc on ERISA plans. Rather, the Seventh Circuit's supposed "materiality" standard (Pet. 10), which petitioner portrays as an "'anti-amendment' rule" (*ibid.*), is quite similar to Congress's authorization for plan amendments only to the extent that they cause no more than a "de minimis" reduction in a participant's benefits. See Pub. L. No. 107-16, § 645(b)(2), 115 Stat. 125-126 (2001).

petitioner's analysis depends on a "suspension" being related to post-retirement employment or, for that matter, there existing any conditions whatsoever limiting whose benefits are suspended. Rather, according to petitioner, so long as the dollar amount of the (theoretically available) monthly benefit check is not "reduced," and as long as a plan does not "eliminate" early-retirement benefits *entirely*, then plans may be amended willy-nilly to "suspend" benefits.

As this example demonstrates – and as the Seventh Circuit concluded – there is nothing magical about the term "suspension" of benefits. The "suspension" of benefits is merely one manner by which an amendment might reduce or eliminate those benefits – and thus be barred by the anti-cutback rule. Any form of reduction of early-retirement benefits – whether called the suspension of benefits (as it was here), or the "offset" of benefits (as in *Michael* v. *Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-1028 (9th Cir. 2001)), or the removal of a "cost of living adjustment" (as in *Hickey* v. *Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992)) – violates the anti-cutback rule. See Pet. App. 9a.

Not only is there no textual support for excluding "suspensions" of benefits from the scope of the anti-cutback rule, but doing so would go against the very reason that rule exists, which is to protect "justified expectations and entitlements" under a plan. *Michael*, 266 F.3d at 1027. Here, a plan member similar to respondents could have decided in 1997 that he was able to retire, based on a calculation that he would be entitled to $1500 a month in benefits and could earn $1000 in non-disqualifying post-retirement employment. According to petitioner, the anti-cutback rule does not prevent a plan from changing the rules in the year 2000, such that this plan member would suddenly have to live on $1500

a month rather than $2500.[12] That is absurd, and finds no support in the anti-cutback rule.

In this case, Messrs. Heinz and Schmitz's retirement benefits were significantly reduced; when they retired, they understood their retirement benefits to be a specified amount each month so long as they did not engage in certain forms of post-retirement employment. Thus, each could make financial calculations about whether to retire based on the amount of retirement benefits he would receive and the amount he expected to be able to earn in non-disqualifying post-retirement alternative employment. By promulgating an amendment that forced respondents to choose *either* their monthly pension check *or* whatever money they could earn in what had been non-disqualifying alternative employment, the Fund has greatly reduced respondents' pension benefits.

Nothing in the Petition undermines this straightforward analysis. The Fund stresses (at Pet. 12) that the term "reduction" is used in conjunction with the term "suspension" elsewhere in ERISA, and argues that reductions therefore cannot include suspensions. But the Fund does not even attempt to refute the Seventh Circuit's explanation (at Pet. App. 12a-14a) that elsewhere in ERISA the comparison is in fact between "*amendments that reduce benefits*, on the one hand, and *suspension of benefit payments*, on the other." Pet. App. 13a (emphasis supplied). It is clear that the mere suspension of benefit payments, *if authorized*, does not violate the anti-cutback rule. Thus, under section 203, a pension plan could be drafted that provides for the suspension of early retirement benefits if a participant accepts *any* form of post-retirement employment. See pages 2-3 and note 3, *supra*. And, were Messrs. Heinz and Schmitt to accept employment as con-

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[12] In this example, a rational retiree would stop working (and lose that $1000 in income) rather than give up his $1500 in pension benefits.

struction workers, under the terms of their plan – *as it existed when they qualified for early retirement* – their benefits could similarly be suspended without violating the anti-cutback rule. But section 203 does not trump section 204; an amendment that *expands* the forms of post-retirement employment that authorize the plan to suspend benefits reduces those benefits, and violates the anti-cutback rule.

Representative Clay's floor comments (see Pet. 13-14) also do not support excluding amendments that expand the availability of suspensions from the anti-cutback rule. Rather – pace petitioner – those comments in fact have no bearing on the question. Representative Clay merely stressed – entirely correctly – that REA did not alter section 203's distinction between what forms of suspensions may be promulgated for "normal" retirement benefits as compared to early-retirement benefits. Compare note 3, *supra*. Neither of these forms of benefit suspension *themselves* violate the anti-cutback rule – but that doesn't mean that an *amendment* expanding the forms of post-retirement employment that result in benefits suspension would not violate the anti-cutback rule. See Pet. App. 16a n.11; 20a.

Finally, the regulations cited by the Fund (at Pet. 14) also have no bearing on the question presented by this case. The first of these, 29 C.F.R. § 2530.203-3(a), merely reiterates that a pension plan is authorized to suspend benefits when a participant accepts specified post-retirement employment without violating ERISA. But *that* is uncontroverted (see Pet. App. 20a-21a; note 3, *supra*), and is a separate question from whether a plan may *change* the rules for suspending benefit payments without violating the anti-cutback rule. Similarly (as the Seventh Circuit explained in detail, see Pet. App. 18a-20a), the second of these regulations, 26 C.F.R. § 1.411(c)-1(f)(1) – which predates REA's clarification that reductions of early retirement benefits shall "'be *treated* as reducing accrued benefits'" (Pet. App. 18a (quoting ERISA § 204(g)(2) (emphasis supplied)) – clarifies only that *already*

authorized suspensions do not violate the anti-cutback rule. An interpretation of this regulation that allowed a plan to *change* the rules on suspensions is not only textually unwarranted but would also violate REA (see Pet. App. 18a-19a), and therefore should be rejected.

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The Seventh Circuit's interpretation of the anti-cutback rule is the only one that makes any plausible sense. Given the obvious correctness of the decision below, the uncertainty about whether there is a circuit split on the question presented, and the minimal importance the ruling in this case will have to pension plans generally – because plan administrators can always amend a plan under the "substantial business hardship" rules if there is any serious risk to the financial integrity of a plan – this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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